

DEPARTMENT OF STATE REVENUE**LETTER OF FINDINGS NUMBER: 99-0481****Sales Tax****For Tax Periods: 1995, 1996 and 1997**

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ISSUES**I. Sales Tax—Food for Human Consumption**

Authority: IC 6-2.5-5-20; 45 IAC 2.2-5-20; Information Bulletin #29

Taxpayer protests the assessment of Indiana sales tax on food items.

II. Tax Administration—Penalty

Authority: IC 6-8.1-10-2.1(d); 45 IAC 15-11-2(c)

Taxpayer protests the imposition of the ten percent (10%) penalty.

STATEMENT OF FACTS

Taxpayer is a specialty retailer of vitamin and mineral supplements, sports nutrition products, herbs and other health related products. Auditor and taxpayer are in disagreement as to the imposition of sales tax on food items. Auditor characterizes the items as "candy". Taxpayer characterizes the items as "health food". Taxpayer waived the administrative hearing, therefore this Letter of Findings is written based on the information already in the file. Further information will be supplied as needed.

I. Sales Tax—Food for Human Consumption**DISCUSSION**

As part of its business as a specialty retailer of vitamin and mineral supplements, sports nutrition products, herbs and other health related products, taxpayer sells food bars.

Taxpayer did not collect sales tax on these food bars. The auditor considered the bars to be “candy”, and assessed taxpayer for the sales tax and penalties. Taxpayer considered the bars to be “health food” and therefore exempt from sales tax under Information Bulletin #29.

Taxpayer relies on Information Bulletin #29 to explain why it did not collect sales tax on the bars in question. Taxpayer’s protest letter explains that it believed “health food” is an exempt food as described in Information Bulletin #29. Information Bulletin #29 lists “Non-taxable Grocery Food Items”, but “health food” is not included on this list. Information Bulletin #29 also lists “Taxable Grocery Items”. “Candy and confectionery” and “Dietary supplements” are listed in this category.

Information Bulletin #29 references IC 6-2.5-5-20. IC 6-2.5-5-20 states that sales of food for human consumption are exempt from the state gross retail tax, and separately lists items included and not included in the term “food for human consumption”. The list for items included in the term “food for human consumption” does not contain “health food”. The list for items not included in the term “food for human consumption” does contain “candy” and “dietary supplements”.

45 IAC 2.2-5-39 is the regulation listing those items considered “food for human consumption”, and “health foods” is listed here. However, 45 IAC 2.2-5-40 is the regulation listing those items not considered “food for human consumption”, and “Candy and Confectionery”, “Dietary Supplements in any form” and “Tonics, Vitamins and other Dietary Supplements” are listed here. The use of the phrases “Dietary Supplements in any form” and “Tonics, Vitamins and other Dietary Supplements” shows that the regulation anticipated the possibility that some food items might have significant nutritional qualities without being health food, and that those items would be subject to sales tax. The bars in question fall into this category, and are therefore not exempt from sales tax.

Since the bars in question are candy, or at best dietary supplements, they are clearly subject to Indiana sales tax. IC 6-2.5-5-20, 45 IAC 2.2-5-40 and Information Bulletin #29 all list candy and dietary supplements as taxable items. 45 IAC 2.2-5-40 lists health food as a tax exempt item, but provides that not all foods with higher nutritional contents will be tax exempt by listing dietary supplements in the non-exempt category. IC 6-2.5-5-20 and Information Bulletin #29 do not list health food at all.

FINDING

Taxpayer’s protest is denied.

II. Tax Administration—Penalty

DISCUSSION

Taxpayer protests the ten percent (10%) penalty imposed with this assessment. Taxpayer claims that it is conscientious and recognizes its responsibility with tax return and payment filing procedures of the State of Indiana, and that it is not the taxpayer's practice or intention to delay or impede the payment of taxes to the State of Indiana. However, the Department of Revenue's records show that items deemed subject to collection of sales tax in this audit were the same as those found in a prior audit.

IC 6-8.1-10-2.1(d) allows a penalty to be waived upon a showing that the failure to pay the deficiency was due to reasonable cause. Department regulation 45 IAC 15-11-2(c) requires that in order to establish reasonable cause, the taxpayers must show that they exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed. The Department finds that taxpayer has not provided a reasonable cause to waive the penalty, since the items deemed subject to collection of sales tax in this audit were the same as those assessed in a prior audit. Thus, the penalty should not be waived.

FINDING

Taxpayer's protest is denied

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